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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Sections of the	)	MM Docket No. 93-215
Cable Television Consumer Protection	)	
and Competition Act of 1992: Rate Regulation	)	MM Docket No. 92-266
	)	

To: The Commission

COMMENTS OF THE
NATIONAL CABLE TELEVISION ASSOCIATION, INC.

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November 16, 1994

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NATIONAL CABLE TELEVISION ASSOCIATION, INC.

The National Cable Television Association, Inc. ("NCTA"), by its counsel, hereby submits its Comments in response to the Further Notice of Proposed Rulemaking in the above-captioned proceeding.[1] NCTA is the principal trade association of the cable television industry in the United States. Its members include owners and operators of cable television systems serving over 80 percent of the nation's approximately 59 million cable television households, as well as cable television program networks, cable equipment suppliers, and others interested in or affiliated with the cable television industry. NCTA's members include companies which are currently eligible for "small system" or "small operator" rate regulation relief.

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1 Fifth Order on Reconsideration and Further Notice of Proposed Rulemaking, MM Docket Nos, 93-215, 92-266, FCC 94-234, released September 26, 1994 ("Further Notice").

I. INTRODUCTION AND SUMMARY

In the Further Notice, the Commission stated that it intended to "establish a more complete record for purposes of promulgating final rate rules applicable to small operators, independent small systems, and small systems owned by small MSOs [by] obtain[ing] comment on possible alternative definitions...."[2] In particular, it sought "comment on definitions of small businesses that could be used to define eligibility for any special rate or administrative treatment that could be established for cable operators in final rules in the above-captioned proceedings."[3] It asked whether the Commission "should retain current definitions or use different definitions for purposes of establishing special rate or administrative treatment for small operators and small MSO's that could be small businesses."[4]

For the reasons stated below, NCTA urges the Commission to afford uniform relief to systems with 1,000 or fewer subscribers (regardless of their ownership) and to systems owned by "small cable companies." Small cable companies should be defined, at a minimum, as those companies with $40 million or less in annual gross revenues from regulated cable services (or a subscriber-based equivalent). In addition, based on its relaxed regulation of Tier 2 LECs, the Commission similarly should afford significant relief to comparable cable companies -- those with $100 million or less in annual revenues from regulated cable operations (or a subscriber-based equivalent). As we discuss below, these definitions of small cable systems and small cable companies find support not only in the 1992 Cable Act and the Small Business Act, but also in Commission precedent providing for special

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2 Id. at ¶11 (emphasis added).

3 Id. at ¶2.

4 Id. at ¶12.

treatment for smaller telephone companies and "small business" applicants for broadband PCS licenses.

The Further Notice reflects a commendable and much-needed Commission decision to revisit the question of which cable systems should be afforded relief from the complex rate regulation regime spawned by the 1992 Cable Act.[5] But the Further Notice addresses only changes in the definitions to determine cable system (or company) eligibility for "special rate or administrative relief."[6] The Further Notice does not address proposals for substantive relief from rate regulation per se, or even the nature of the "special rate and administrative relief" which would be afforded eligible cable systems and companies.

While the focus of this proceeding is clearly on eligibility for small cable system or company relief, the Commission cannot lose sight of the fact that real, substantive relief is required for those entities. The Commission must recognize that current "rate and administrative" relief simply has not addressed the significant and special problems small system operators and small cable companies have in dealing with rate regulation -- problems which are amply documented in the record of the above-captioned proceedings.

Accordingly, while these Comments focus on the definitional questions raised in the Further Notice, NCTA urges the Commission to take prompt action to provide small system operators and small cable companies significant substantive relief from rate regulation. To this end, we encourage the Commission to act upon proposals for such relief currently pending before it[7] or which it has previously

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5 Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("1992 Cable Act").

6 Further Notice at ¶12.

rejected but may revisit again in light of the disproportionate impact regulation has had on small systems and small cable companies.[8] Only by providing such substantive relief, can the Congressional mandate to reduce the regulatory burdens on smaller cable entities truly be implemented.

II. THE CURRENT DEFINITIONAL SCHEME

The Commission has created several size-based categories in its efforts to comply with the Congressional mandate to reduce burdens on small systems and to recognize the difficulty small cable companies would have in complying with its rate regulation regime. Section 623 (i) of the 1992 Cable Act states:

> In developing and prescribing regulations pursuant to this section [623], the Commission shall design such regulations to reduce the administrative burdens and cost of compliance for cable systems that have 1,000 or fewer subscribers.[9]

A. Small System Relief

First, consistent with the statute, the Commission defines "small systems" as those serving 1,000 or fewer subscribers, without regard to ownership. However, the Commission has provided such systems minimal administrative relief. Specifically, the only relief that all "small systems" (regardless of affiliation or relationship with larger cable entities) are afforded is that they may establish unbundled charges for regulated equipment based on average equipment costs for

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7 See e.g., Letter to Meredith Jones, Chief, Cable Services Bureau, from Stephen Effros, President, Cable Telecommunications Association, October 25, 1994 (proposing alternative regulation for systems serving 1,000 or fewer subscribers). See also, Cableworld, October 24, 1994 at 12 (discussing CATA proposal)

8 See e.g. Petition For Reconsideration in MM Docket No. 92-266, filed by the Coalition For Small System Operators, June 21, 1993 (proposing "net income test" to determine whether rates for systems serving 1,000 or fewer subscribers should be deemed reasonable).

9 1992 Cable Act, §623 (i). See also 47 C.F.R. §76.901 (c).

small systems and they may certify that their rates for basic service and equipment are reasonable.[10]

B. Independent Small Systems and Systems Owned By Small MSOs

The Commission's regulations limit other small system relief to what it terms "independent small systems," i.e., those systems of 1,000 or fewer subscribers that are neither owned nor affiliated with any other system[11] or to small systems owned by "small multiple system operators" ("small MSOs"), although neither limitation finds support in the statute. A small MSO is defined as an MSO serving 250,000 or fewer subscribers that owns only systems with less than 10,000 subscribers each and has an average system size of 1,000 or fewer subscribers.[12]

Independent small systems, but no other small systems, may restructure their rates and service offerings within 90 days of regulation on a tier, without prior regulatory approval.[13] Independent systems and small systems owned by MSOs may:

- Opt for "streamlined rate reductions" under which they may reduce each billed item of regulated cable service as of March 31, 1994 by 14 percent instead of setting rates based on the 17 per cent competitive differential,[14]

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10 47 C.F.R. §76.923 (1); §47 C.F.R., 76.934(a).

11 47 C.F.R. §76.922 (b)(5)(A).

12 Id.

13 Further Notice at ¶¶7,8, release September 26, 1994.

14 47 C.F.R. §76.922(b)(5)(B).

- **Use abbreviated summary level accounts (32 as opposed to 55 levels) to identify their costs and simplified forms for the purpose of making a cost-of-service showing;[15]**

- **Pass through, on a going-forward basis, license fees plus headend equipment costs needed to offer up to seven channels of additional programming on cable programming service tiers over the next three years, consistent with limitations established by the FCC.[16]**

C. Small Operators

Finally, the Commission permits small operators -- those operators serving 15,000 or fewer subscribers and not affiliated with a larger operator[17] -- to maintain their March 31, 1994 rates pending the completion of cost studies.[18] Small operators may also restructure rates and service offerings within 90 days of regulation of a tier, without prior regulatory approval.[19]

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15 Report and Order and Further Notice of Proposed Rulemaking, MM Docket No. 93-215, FCC 94-39, released March 30, 1994 at ¶¶223, 272-279 ("Cost-of-Service Order").

16 See FCC News Release, "Commission Acts on Cable Television 'Going Forward' Issues To Ensure That Consumers Have Access to New Programming and Services at Reasonable Rates, " November 10, 1994.

17 A small operator is considered affiliated with a larger operator if the latter holds more than a 20 percent equity interest (active or passive) in the smaller company or the larger company exercises actual working control over the smaller company. Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, March 30, 1994 at n.157 ("Second Order on Reconsideration).

18 47 C.F.R. §76.922 (b)(4)(A)(i).

19 Further Notice at ¶¶6-8.

III. THE COMMISSION SHOULD AFFORD SMALL SYSTEM RELIEF TO ALL SYSTEMS WITH 1,000 OR FEWER SUBSCRIBERS

A. The Statute Compels -- And Commission Policy Supports -- Small System Relief for All Systems with Fewer than 1,000 Subscribers

As noted above, the Commission's regulatory scheme currently differentiates among small systems based on ownership. However, as the Commission observed in the first Report and Order in this proceeding, such differentiation is unwarranted both as a matter of law and policy, particularly in light of the special problems faced by small systems.[20] As the Commission correctly recognized:

> [N]o distinction should be made between small systems that are independent and those controlled by MSOs. First, the language of the Cable Act does not distinguish between independently owned small systems and those owned by MSOs. Second, the problems faced by small systems serving smaller, often more rural communities occur whether or not the system is owned by an MSO. Operators must still cope with higher costs associated with serving a smaller subscriber base. We agree with NCTA that in light of the decentralized nature of the cable industry, we should not presume that large corporate ownership of a small system automatically would make compliance with our rate regulation rules and procedures less costly. Therefore, we will apply our small system rules to systems with under 1000 subscribers, regardless of whether the system is an independent one or owned by an MSO.[21]

Less than one year later, the Commission did a 180-degree about-face and limited small system relief to what it defined as "independent" small systems or

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20 Report and Order, in MM Docket No. 92-266, FCC 93-177, released May 3, 1993, at ¶456-64 ("Report and Order") at ¶456-464.

21 Report and Order at ¶464 (emphasis added).

small systems owned by what it defined as "small MSOs."[22] This proceeding provides an opportunity to revisit the issue of those entities which can and should be afforded rate regulation relief, particularly "small systems" as defined by the 1992 Cable Act. We believe that the plain meaning of the Commission's statutory mandate requires the Commission to conclude that affording small system relief to all systems of 1,000 or fewer subscribers would be consistent with the Cable Act, its legislative history, and sound public policy.

1. Congress Provided for Relief for Every Small Cable System, Regardless of Ownership

Congress plainly directed the Commission to prescribe cable rate "regulations that reduce the administrative burdens and cost of compliance for cable systems that have 1,000 or fewer subscribers."[23] Limiting this provision to independently-owned systems and those affiliated with small MSOs, as do the current rules, is inconsistent with the Commission's statutory mandate. Congress did not -- as the Commission initially recognized -- distinguish in the statute between small systems based on the size of the company that owns them.

Since the plain meaning of Section 623(i) is clear (i.e., that relief should be afforded to all systems with 1,000 or fewer subscribers), there is no need to resort to legislative history to determine Congressional intent. In fact, the legislative history that exists with respect to Section 623(i) supports the view that relief should be afforded to all systems of 1,000 or fewer subscribers. As NCTA and other parties pointed out in comments on the Commission's initial rulemaking on "small

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[22] See Second Order on Reconsideration at ¶216. See also Cost-of-Service Order at ¶¶278 (streamlined form), 223 and n.436 (abbreviated summary level accounts).

[23] 1992 Cable Act, §623(i).

system" regulation, Congress specifically rejected attempts to exclude small systems affiliated with larger companies from the small system relief provision in the Act.[24]

During House debate on H.R. 4850, Congressman Cooper advocated limiting the applicability of the "small system amendment" offered by Congressman Slattery (which raised the eligible subscriber base from 500 to 1,000 or fewer subscribers) solely to independently-owned small systems.[25] After some discussion, the Slattery amendment was passed as drafted, instructing the FCC to reduce the administrative burdens and the costs of compliance for all cable systems that have 1,000 or fewer subscribers. There was no revision or modification of the provision by the Conference Committee before final passage of the Act.

In reversing its previous position, the Commission dismissed this legislative history, noting that "the fact that some members of Congress unsuccessfully objected to the provision regarding administrative relief for systems with less than 1,000 subscribers because MSO-owned systems would fall within this category, does not demonstrate that Congress intended to limit our flexibility in fashioning appropriate administrative relief."[26] However, even assuming the Commission could brush off that legislative history in such a summary (and incorrect) fashion, it is not merely the legislative history which compels the conclusion that small system relief must be accorded to systems with 1,000 or fewer subscribers. Both

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24 See e.g., Comments of NCTA, Coalition of Small System Operators, Falcon Cable Group, Medium-Sized Operators Group, filed August 31, 1993.

25 See 138 Cong. Rec. H6525, H6526 (July 23, 1992) (colloquy during House floor debates between Congressman Cooper and Congressman Slattery).

26 Second Order on Reconsideration, at ¶221.

the plain meaning of Section 623(i) of the 1992 Cable Act and its legislative history make clear that while Congress gave the Commission, as the implementing agency, the flexibility to determine how to fashion administrative relief for small systems, it determined that such relief had to be extended to all systems with 1,000 or fewer subscribers. The Commission cannot ignore those considerations in defining systems eligible for small system relief.

2. As a Policy Matter, Special Relief is Warranted For All Small Systems

As the Commission recognized in its initial Report and Order, "the problems faced by small systems serving smaller, often more rural communities, occur whether or not the system is owned by an MSO."[27] Indeed, all small systems share the costs associated with serving areas with low population density. The physical plant alone (which is often made up of older, high maintenance equipment) requires higher than average construction costs and ongoing technical and customer service support.

As described by one MSO, the classic cable systems serving remote, sparsely-populated areas, which generally have poor television reception, "normally have to incur significant extraordinary expenses in the form of larger towers, microwave facilities and additional signal processing equipment in order to provide the basic complement of off-air broadcast service that is mandated by the 1992 Cable Act."[28]

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[27] Report and Order at ¶464.

[28] Comments of the Falcon Cable Group In Response to Further Notice ("Falcon"), MM Docket No. 92-266, filed August 31, 1993, at 8.

Such costs, spread over a small subscriber base, make it difficult to re-build and upgrade facilities, to obtain a return on investment and to service debt.[29] Moreover, many small system operators cannot look to the rural, and often poorer communities, they serve to provide increased revenue from local advertising or new, unregulated services.

Affiliation with an MSO neither negates, nor substantially lessens, these costs. Nor does it necessarily enhance a small system's ability to attract and retain capital to upgrade and improve plant. For example, as Falcon explained in its earlier comments, it has financed its systems in the private market through a series of limited partnerships. Falcon's ability to raise capital through partnership investment rests solely upon the financial performance of those systems that are controlled and owned by a particular partnership.[30] It is thus unrealistic and inequitable to aggregate all affiliated partnerships based upon the speculative assumption that MSO affiliation alone results in lower capital costs.

Indeed, denying administrative relief to small systems which are affiliated with a larger company is a misguided policy. It not only fails to take into account the well-recognized costs and burdens of operating a small system, but ignores the local nature of rate regulation. Compliance with the rate rules is handled on a system-specific, community-by-community basis. For many MSOs, it is the local

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29 See Comments of Tele-Media Corporation, MM Docket No. 92-266, filed August 31, 1993, at 4.

30 See Comments of Falcon at 9-10 (noting that the financial stability of the underlying enterprise, the cash flow margins and the expertise of the operator are the most important factors in attracting capital. Higher administrative costs associated with rate regulation may result in demands for higher interest rates from lenders to compensate for the higher perceived risks resulting from the reduced marginal cash flow.)

general manager who performs the calculations and determines rate modifications; prepares the relevant FCC forms; informs and bills subscribers; provides customer service and technical support; and implements must carry and retransmission consent obligations. Local franchising authorities in these cases look to the local cable operator, not a far-off corporate office, for compliance with the complex, burdensome rate regulation regime.

Notwithstanding the local nature of FCC rate regulation, the Commission merely assumes that small systems affiliated with larger MSOs "are likely to have the resources necessary to expeditiously establish compliance with rate regulation requirements."[31] But, as others have indicated[32], not all MSOs have a centralized corporate administrative staff able to address benchmark and cost-of-service issues arising in hundreds of local franchises. For such MSOs, those issues must be handled primarily on a local basis. For these reasons, one cannot assume that the increased costs and administrative burdens on small systems are relieved when a system is co-owned with other systems that in the aggregate reach a large number of subscribers nationwide.

Moreover, the Commission should not differentiate between small systems based on assumptions about efficiencies and economies of larger parent companies. While programming and equipment discounts may present some savings for an MSO's small affiliates, these benefits are far outweighed by the costs of constructing, maintaining and operating small cable systems.

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31 Second Order on Reconsideration at ¶216.

32 See e.g. Comments of Falcon at 7; Comment of Bend Cable Communications, Inc., Cable Management Corporation and River Valley Cable TV, MM Docket No. 92-266, filed August 31, 1993.

Therefore, in adopting definitions for small system administrative and substantive relief, the Commission should not limit that relief to independently-owned systems or systems owned by so-called "small MSOs." Any "special rate or administrative relief" established for smaller systems must be afforded to all systems with 1,000 or fewer subscribers. Such a decision would be consistent with previous Commission decisions to exempt such systems from other FCC cable regulations such as those regarding network non-duplication,[33] syndicated exclusivity,[34] sports blackout,[35] proof of performance testing,[36] and public file inspections.[37]

In sum, strong public policy considerations buttress the statutory and legislative history reasons for applying small system relief to all small systems regardless of ownership.

B. Eligibility For Small System Relief Should Be Calculated On A Franchise, Not Headend, Basis

Finally, in revisiting the question of small system relief, the Commission should correct a fundamental error in its previous decision in this area. In the Report and Order, the Commission concluded that, for purposes of determining whether a system was eligible for small system relief, it would count all subscribers on a system's principal headend.[38] In fact, the Commission determined that

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[33] 47 C.F.R. §76.156(b).

[34] 47 C.F.R. §76.95(a).

[35] 47 C.F.R. §76.67(f).

[36] 47 C.F.R. §76.601(e).

[37] 47 C.F.R. §76.305(a).

[38] Report and Order at ¶465. See also Second Order on Reconsideration at ¶227.

subscribers served by any other headend or microwave receive sites that are technically integrated into the system's principal headend would be counted for determining whether the system was eligible for small system relief.[39] That decision was based in part on the theory that, with respect to other cable regulations, system size was determined on a headend basis and to do so with respect to the rate regulation rules would "harmonize" the small system rule with existing rules on cable system size. The Commission was also concerned that use of a franchise area definition would result in some segments of the same operation receiving rate treatment different from that afforded other segments of the operation.[40] That reasoning, however, does not withstand scrutiny.

While sound reasons may have existed for determining exemption from other cable rules (particularly rules involving technical or signal carriage requirements) based on subscribers per headend, no such reasons exist in the case of determining eligibility for small system relief from rate regulation. For instance, cable regulations dealing with the burdens of FCC signal carriage requirements have a logical nexus with a system's headend(s) because it is at the headend where such equipment costs and other burdens of complying with those regulations are imposed. But no such relationship exists between the burdens imposed by rate regulation and the system's headends.

Indeed, all relevant considerations dictate measuring system size for rate relief on a franchise, not a headend, basis. At the most fundamental level, rate regulation is conducted on a franchise-by-franchise basis, with each local franchising authority being the primary regulator of the basic tier of cable

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39 Report and Order at ¶465.

40 Id.

services.[41] That factor alone should compel the conclusion that the determination of what systems are eligible for relief from rate regulation should be made on a franchise basis.

Moreover, by requiring that eligibility for small system relief be determined on an integrated headend basis, the Commission provides a disincentive rather than the incentives the Commission seeks to provide[42] for cable companies to engage in cost-efficient technical consolidation of systems, all to the ultimate detriment of the consumer. Consolidation of adjacent systems is vital not only to promotion of more efficient delivery of cable services, but also is a precondition to effective cable competition to the monopoly local exchange carriers.[43]

If systems serving 1,000 or fewer subscribers in a franchise area become ineligible for rate and administrative relief because they are consolidated with adjoining systems and are all served by a "technically-integrated" headend, the incentive to consolidate will be significantly reduced. At a minimum, cable operators must weigh the efficiencies to be achieved by using technically-integrated headends to serve newly-consolidated systems against the costs of being subject to "larger system" rate regulation. Cable operators should not be penalized -- by having their small systems become subject to more burdensome rate regulation --

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41 1992 Cable Act, §§623(a)(3), 623(b).

42 Second Order on Reconsideration, at ¶227.

43 Indeed, in comments filed in an earlier stage of this proceeding, the National Telephone Cooperative Association ("NTCA") took issue with the proposal to determine eligibility for small system relief based on the number of subscribers served by a technically-integrated system. NTCA correctly cautioned the Commission that such a definition would penalize technically and economically efficient companies. See NTCA comments, August 25, 1993 at 4.

for taking advantage of economies of scale and new technologies capable of extending the benefits of cost-efficient cable (and potentially telephone) service to the public. Yet that is the natural consequence of determining eligibility for small system rate relief on a "technically-integrated" headend, rather than a franchise, basis.

For these reasons, in calculating system size for determining whether a system is entitled to special rate and administrative relief, the appropriate measurement should be the number of subscribers served on a franchise, not headend, basis.

IV. SMALL CABLE COMPANIES SHOULD ALSO BE ELIGIBLE FOR SPECIAL RATE AND ADMINISTRATIVE RELIEF

In the Further Notice, the Commission recognizes that it must examine "possible alternative definitions that [it] could use for purposes of determining eligibility for special rate or administrative treatment provisions that could apply to small businesses."[44] In particular, the Further Notice seeks comment "on these issues in light of Section 3(a) of the Small Business Act, and on whether we should employ the current SBA definition of a small cable company in our cable rules."[45]

As indicated above, in addition to small system relief, the current regulatory regime also affords relief to "small operators," defined as operators with 15,000 or fewer subscribers nationwide which are not affiliated with a larger company. While, by granting such relief, the Commission recognized that small cable companies are in need of special relief, the eligibility standards now applied -- and the "relief" extended -- to "small cable operators" are inadequate.

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44 Further Notice at ¶11.

45 Id. at ¶12.

The Further Notice clearly contemplates establishment of an alternative category to small cable systems, comprised of small cable companies, which would be eligible for special rate or administrative relief based on the size of a particular cable company. That category should supplement, not replace, the other category of entities eligible for relief, i.e. those small systems of 1,000 or fewer subscribers referenced in Section 623(i) of the 1992 Cable Act. Accordingly, whatever relief from rate regulation currently exists or becomes available for small systems should also be available to small cable businesses.

As discussed below, in order to address the special needs of small cable businesses, the Commission should adopt a definition of a small cable business eligible for special rate and administrative relief that, at a minimum, is comparable to the definition used in its regulations for "small telephone companies" and for "small businesses" eligible for broadband Personal Communications Services ("PCS") auctions. Those precedents support defining a "small cable company" as, at a minimum, a company with $40 million or less in annual gross revenues from regulated cable services (or the equivalent number of subscribers).

At the outset, it must be noted that NCTA agrees with the Small Cable Business Association ("SCBA") that the Commission's current rules with respect to relief for small operators were adopted without complying with the requirements of the Small Business Act.[46] NCTA, and other cable petitioners, have raised this

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[46] 15 U.S.C. §631 et. seq. The Commission has argued that Section 3 of the Small Business Act does not require application of the SBA procedures or size standards to cable rate regulation because the 1992 Cable Act establishes its own size standard and because cable systems are dominant in their fields of operation, making Section 3 inapplicable. See Further Notice at n.30. NCTA disagrees with the Commission's summary rejection of the Section 3 argument in the Further Notice. However, since this issue is currently on appeal we will not address it further in these comments.

issue as part of the appeal of the Commission's rate regulation orders.[47] The Further Notice provides the Commission and interested parties a vehicle for addressing the issues raised by SCBA and others and for adopting rules to accommodate small cable businesses.

As the Commission has recognized in the Further Notice, the provisions of the Small Business Act must be taken into account in formulating regulations applicable to small businesses. In particular, if the Commission proposes to adopt any regulations governing small businesses it must either adopt the SBA definition (unless certain exceptions apply) or follow procedures specified in the Small Business Act. Until recently, when adopting size standards to govern small businesses, the Small Business Act required an agency to adopt a size standard based on gross revenues (or number of employees) when dealing with non-manufacturing businesses.[48]

This rulemaking appears intended to satisfy the procedural requirements of the Small Business Act.[49] But, whatever its intent, the Further Notice provides an opportunity to further the Congressional policy reflected in the Small Business Act -- that federal agencies must accommodate small businesses when they develop rules affecting such entities.

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[47] See Joint Brief for Petitioners in Time-Warner Entertainment Co., L.P. et al. v. FCC, Case No. 93-1723 (and consolidated cases), filed August 25, 1994, at n.1. See also Separate Brief of Intervenor Small Cable Business Association, filed September 7, 1994.

[48] 15 U.S.C. §623(a)(2). See §30 of the Small Business Administration Reauthorization Act of 1994 (permitting agencies to adopt size standards based on criteria other than gross revenues with approval of SBA).

[49] Further Notice at ¶¶9, 12.

The Commission is not unfamiliar with providing special relief for small businesses in the context of its regulations. As noted above, the Commission has made an effort to accommodate small business concerns with its definition of small cable operators. In other contexts, it has made similar, and better-grounded, efforts. The Commission should look to those areas -- small telephone company regulation and eligibility standards for broadband PCS auctions -- in fashioning eligibility criteria for small cable companies. At a minimum, the standard used in those cases should be used as a baseline for establishing eligibility for small cable company rate and administrative relief.

A. The Commission Should Adopt Small Cable Company Relief Size Standards Comparable To Those Adopted For Relief For Small Carriers

The FCC has established several classifications of local exchange carriers ("LECs" or "telcos"), with smaller carriers enjoying relaxed regulation of their tariffs and exemption from other requirements, such as equal access, that were found to be too burdensome for all but the largest telephone companies. The FCC classifies LECs as Tier 1 or Tier 2 companies.[50] Tier 1 LECs have 1 million or more access lines and annual revenues from regulated telecommunications operations of $100 million or more. Tier 2 LECs have fewer than 1 million access lines and annual revenues from regulated telecommunications operations of less than $100 million. Tier 2 companies need not generate and file the annual and

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50 See Commission Requirements For Cost Support Material to be Filed with 1990 Annual Access Tariffs, 5 FCC Rcd 1364, 1364 (Com. Car. Bur. 1990)(defining Tier 1 LECs using the criteria used to define Class A companies in 47 C.F.R. §§ 32.11(a),(e)).

quarterly financial and traffic reports required of Tier 1 LECs[51] and are exempt from the Commission's expanded interconnection requirements.[52]

A subset of Tier 2 carriers, denominated as "small telephone companies," have 50,000 or fewer access lines in a given "study area" (i.e., state) and total annual revenues of $40 million or less. 47 C.F.R. §§1.39(a); 69.602. These companies enjoy reduced regulatory oversight of such matters as interstate access tariffs, supporting cost data, and cost accounting, and they may elect an incentive regulation plan.[53]

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[51] Tier 1 LECs must compile and submit cost allocation manuals for regulated and non-regulated accounts; a report showing forecasts of regulated and non-regulated usage and costs for each account; company-wide data for each account specified in the Uniform Systems of Accounts; a study area report containing data for each revenue requirement related to such accounts; and a study area report containing jurisdictional separations and interstate access results for each category specified in Parts 36 and 69 of the Commission's Rules. In addition, only Tier 1 LECs must generate quarterly reports that summarize data necessary to monitor revenue to comply with the Commission's accounting, joint costs, jurisdictional separations, rate base disallowable, and access charge rules. See 47 C.F.R. §§43.21, 43.22.

[52] Tier 1 LECs are required to offer expanded interconnection to all interested parties, permitting competitors and high volume users to terminate their own special access transmission facilities at LEC central offices. 47 C.F.R. §64.1401(a).

[53] In several important respects, the definition of small telephone company is more generous than the definition of small cable operator: A small telephone company remains classified as small even if it has 50,000 access lines in each of several other states, so long as its total annual revenues are no more than $40 million. See Regulation of Small Telephone Companies. 2 FCC Rcd 3811, 3812 (1987). Small telephone companies also have greater rate flexibility than small cable operators. Among other things, the rates filed by small telephone companies are presumed reasonable absent a substantial showing that they are unreasonable. See C.F.R. §1.77(a)(iii); 47 C.F.R. §61.39(d). If they elect an incentive plan (analogous to benchmark cable rates), they may raise rates up to 10 percent on 14 days' notice. See 47 C.F.R. §61.58(e)(2).

As is evident from the above description, Tier 2 LECs -- those with fewer than 1 million access lines and annual revenues from regulated telecommunications operations of less than $100 million -- are subject to significantly reduced burdens with respect to FCC regulations. Small telcos -- those with 50,000 or fewer access lines per study area and $40 million or less in annual revenues -- are afforded even greater relief.

The Commission made such distinctions based upon the difficulties of compliance for smaller telcos. As the Commission said:

> Small telephone companies may have valid reasons for electing to file their own access tariffs, but may confront administrative costs that are proportionately higher in relation to their revenues and smaller resources than large companies. Our goal in this proceeding is to eliminate unnecessary direct regulatory burdens affecting small telephone companies, thereby decreasing their regulatory costs.[54]

For similar reasons, the Commission has recognized a need to alleviate the burdens of regulation on smaller cable companies. But the principal relief provided for such companies, "transition relief," is linked to companies with 15,000 or fewer subscribers. That size standard, particularly given the limited "relief" available to such operators, is hardly comparable to the relief afforded small telcos, let alone Tier 2 LECs. By analogy, at a minimum, cable companies with total annual revenues from regulated cable services of $40 million or less should be eligible for substantial rate regulation relief.

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54 Regulation of Small Telephone Companies, 2 FCC Rcd at 3811. See also Public Notice, "Commission Requirements for Cost Support Material to be Filed with ACCESS TARIFFS on March 1, 1985," January 25, 1985 at 3 ("The amount of detail required was intentionally formulated to avoid any disproportionate burden on small telephone companies.").

In fact, based on its relaxed regulation of Tier 2 LECs, the Commission similarly should afford significant relief to comparable cable companies -- those with $100 million or less in annual revenues from regulated cable operations (or a subscriber-based equivalent).

B. The Commission's Definitions Of "Small" And "Entrepreneurial" Businesses Used For Purposes Of Broadband PCS Auctions Support Adoption Of A Higher Size Standard For Small Cable Companies

A standard of at least $40 million in gross revenues for defining small companies also finds support in other FCC size standards. For purposes of spectrum auction procedures, the Commission was required by statute to define "small businesses" in connection with the auctions for commercial mobile radio service licenses. Significantly, the Commission chose to adopt a size standard for "small business" for purposes of its broadband PCS auctions identical to that adopted for "small" telephone companies.

For purposes of the PCS auction rules, "small businesses" are those with gross revenues of $40 million or less for each of the preceding three years.[55] Among other reasons for adopting the $40 million standard, the Commission noted the SBA's comments that the $40 million standard identifies "those companies that have significantly greater difficulty in obtaining capital than larger enterprises."[56] Moreover, "entrepreneurial" businesses are defined as those having gross revenues

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[55] Fifth Report and Order, PP Docket No. 93-253, FCC 92-178, released July 15, 1994 at ¶172-180 ("Fifth Report and Order").

[56] Id. at ¶175. See also Id. at ¶118 ("The inability of small businesses...to obtain adequate private financing creates a serious imbalance between these companies and large businesses in their prospects for competing successfully in broadband PCS auctions).

between $40 million and $125 million, and less than $500 million in total assets.[57] These entities also are entitled to significant benefits in the spectrum auction process.[58]

The $40 million annual revenue figure used by the Commission for determining eligibility for small businesses in broadband PCS auctions essentially tracks the definition used for small telephone company eligibility for purposes of relief from federal common carrier requirements. Both standards were adopted in recognition of the special burdens such small companies have in complying with federal regulations and raising capital. The same concerns with respect to the burdens imposed on small cable companies by rate regulation animated the Commission's adoption of the Further Notice. For these reasons, the Commission should adopt, at a minimum a $40 million annual gross revenue standard (or a subscriber-based equivalent) for eligibility for significant small cable company relief.

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[57] Id. at ¶156.

[58] For example, small businesses that win an auction qualify for alternative payment schedules, such as installment payments, as well as bidding credits for obtaining PCS licenses. Large businesses must tender full payment of the winning bid upon receipt of the licenses. Additionally, PCS Frequency Blocks C and F, also known as the "entrepreneur's blocks," are open to bidding solely from entrepreneurial businesses. And, in order to help small businesses obtain financing, cellular companies are permitted to hold a non-controlling equity interest of up to 40 percent in small businesses without violating the cellular/PCS cross-ownership restrictions. For other entities, cellular carriers are restricted to a 20% interest. See Fifth Report and Order at ¶113.